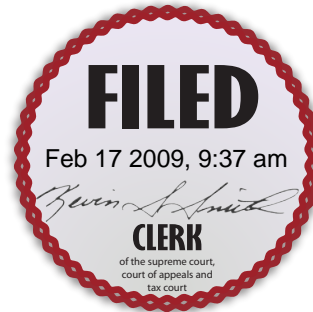


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

**ERIC D. SMITH**  
New Castle, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ERIC D. SMITH,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 46A04-0810-CV-631
	)	
WILLIAM K. WILSON,	)	
	)	
Appellee.	)	

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APPEAL FROM THE LAPORTE SUPERIOR COURT  
The Honorable Paul J. Baldoni, Judge  
Cause No. 46D03-0712-MI-521

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**February 17, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Eric Smith appeals the dismissal of his petition for writ of habeas corpus. We affirm.

### **Issue**

Smith raises one issue, which we restate as whether the trial court properly dismissed his claim on the basis that it was frivolous.

### **Facts**

Smith is incarcerated, serving a twenty-year sentence for Class B felony arson. On December 3, 2007, he filed a petition for writ of habeas corpus alleging that he should be immediately released based on his accrual of educational credit time.

That same day, the trial court dismissed the petition pursuant to Indiana Code Section 34-58-2-1, Indiana's Three Strikes Law. On December 20, 2007, Smith filed his notice of appeal. On March 31, 2008, the motions panel of this court ordered that Smith's appeal be dismissed. On April 9, 2008, our supreme court issued an opinion in another case filed by Smith declaring the Three Strikes Law unconstitutional. See Smith v. Indiana Dept. of Correction, 883 N.E.2d 802, 806 (Ind. 2008). On April 29, 2008, Smith petitioned for rehearing. On August 29, 2008, the motions panel granted Smith's petition for rehearing and remanded for the trial court to determine whether his petition was frivolous.

On September 18, 2008, the trial court dismissed Smith's petition. In doing so, the trial court concluded, "the plaintiff's claim lacks any arguable basis in fact or law." Appellant's Br. p. 9. Smith now appeals.

## Analysis

Smith argues that his petition was improperly dismissed. Pursuant to Indiana Code Section 34-58-1-2, a trial court shall review a complaint or petition filed by an offender and determine if the claim may proceed. A claim may not proceed if the court determines the claim is frivolous. Ind. Code § 34-58-1-2(a)(1). A claim is frivolous if it lacks an arguable basis either in law or fact. I.C. § 34-58-1-2(b)(2).

In reviewing the dismissal of a claim pursuant to Indiana Code Section 34-58-1-2, we employ a de novo standard of review. Smith v. Huckins, 850 N.E.2d 480, 484 (Ind. Ct. App. 2006). “Like the trial court, we look only to the well-pleaded facts contained in the complaint or petition as well as the fact that a judicial record dismissing a case exists.” Id. “Further, we determine whether the complaint or petition contains allegations concerning all of the material elements necessary to sustain a recovery under some viable legal theory.” Id. To the extent Indiana Code Section 34-58-1-2 is akin to a legislative adoption of Indiana Trial Rule 12(B)(6), we take everything the plaintiff has alleged as true and determine whether the claim can proceed. Peterson v. Lambert, 885 N.E.2d 719, 721 (Ind. Ct. App. 2008).

In his petition, Smith claimed that he completed various educational courses and is entitled to credit time that he has not received. He also asserted, “Wilson<sup>[1]</sup> agreed to clear Smith’s conduct record if Smith completed anger management courses, and Smith did; however, because of Smith’s lawsuits, Wilson has not done so and has not credited Smith with his time cuts, which would free Smith from custody.” App. p. 6.

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<sup>1</sup> According to Smith’s petition, Wilson is the superintendent of the Westville Correctional Facility.

Indiana Code Section 35-50-6-3.3 allows a prisoner to obtain credit time for the successful completion of various education programs. However, in addition to completing the specified educational requirements, the prisoner must also be in credit Class I and demonstrate “a pattern consistent with rehabilitation[.]” See I.C. § 35-50-6-3.3(a)-(b). Even when construing all of Smith’s allegations as true, Smith’s petition does not allege that he was in credit Class I or that he had demonstrated a pattern consistent with rehabilitation. At most, the petition alleges that Wilson agreed to clear Smith’s conduct record. We cannot infer that a clear conduct record would establish that Smith was in credit Class I or that it would demonstrate a pattern consistent with rehabilitation. We cannot conclude that Smith’s petition contains allegations concerning all of the material elements necessary to sustain a recovery under some viable legal theory. The trial court properly dismissed Smith’s petition as frivolous.

### **Conclusion**

Because Smith’s petition did not establish all of the elements of a claim for educational credit time, the trial court properly dismissed it. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.